AMENDED HEARINGS OFFICER DECISION

BEFORE THE LAND USE HEARINGS OFFICER
OF MULTNOMAH COUNTY, OREGON

Regarding an application for a Conditional use and Significant Environmental Concern review and approval for development of a single family dwelling on Tax Lot 23, Section 10 T2N R2W in unincorporated Multnomah County, Oregon	)))))	Case No. CU 8-96 and SEC 14-96

I. SUMMARY OF THE REQUEST

The applicant requests a Conditional Use Permit for a "template dwelling" and a Significant Environmental Concern Permit on Tax Lot 23, Section 10 T2N R2W which is in the Commercial Forest District and has a Significant Environmental Concern (wildlife habitat) overlay zone. The subject property contains 4.68 acres and is located ½ mile south of Skyline Blvd. on N.W. Moreland Road.

The subject property fronts on the west side of N.W. Moreland Road, along a horizontal curve in the roadway. The site is generally triangular in shape. The site slopes northwesterly down from N.W. Moreland Road. Elevations range from approximately 1160 to 1240 feet. A seasonal drainage way (draw) crosses the north central portion of the site flowing in a generally east to west direction. The slopes range from 5% in the southern portion near N.W. Moreland Road to over 40% in the central western portion of the site adjacent to the draw. The site is moderately forested with deciduous and coniferous trees and underbrush. A Bonneville Power Administration (BPA) Transmission Line right-of-way crosses the southwest corner of the property. The easement for this transmission line extends 75 feet on either side of the line. Additionally, a Portland General Electric (PGE) easement roadway crosses the southwestern portion of the site approximately 150 feet north of the BPA centerline extending to the west generally parallel to the BPA transmission line. The PGE easement roadway is gated at its access point on N.W. Moreland Road. The property is largely covered with deciduous trees and understory vegetation.

The applicant proposes to establish a 55 foot by 75 foot home site on the subject property. The proposed home site location is 200 feet east of the west property line, 295 feet south of the north property line and 78 feet northwest of the centerline of N.W. Moreland Road.

The area surrounding the property has been logged in recent years and is replanted with young Douglas fir seedlings. Properties in the surrounding area range in size from less than one to nearly sixty acres. Some of the smaller lots are developed with rural residences, while the larger parcels are used for forestry practices.

II. PUBLIC HEARING

A. Hearing

Hearings Officer Deniece Won held duly noticed public hearings regarding the application on February 19, 1997 and March 5, 1997.

B. Summary of Testimony and Evidence Presented

1. Lisa Estrin, County planner, showed a video of the site taken on February 18, 1997 and summarized the staff report. The driveway that was partially cleared is not a significant alteration of the parcel. The video showed an uninhabitable structure on Tax Lot 17. Ms. Estrin testified the 160-acre template shows three possible dwellings. One is the uninhabitable structure. The second is across the street. The third did not exist on January 1, 1993; the building permit was not issued until March 3, 1993. She testified that there are no other dwellings in the template. The County Code requires there be five (5) dwellings in the template. She said the application meets neither the State nor the County template requirements. Concerning the location of the driveway and the requirement that it's length be minimized, she said different locations need to be analyzed. Working with the roadway department, the staff was able to get the access down to 225 feet. As proposed the driveway was 550 feet. The third issue is the lot of record provision. She said that staff has researched this issue. She testified that the lot seems to have met all the regulations that Multnomah County applied at the time it was created. There is some question about whether a variance was necessary under the lot of record provision. The staff never interpreted the Code to require a variance. The lot of record provision was interpreted to say that if a County road bisected a parcel an owner could record a deed. That is what appears to have occurred with this lot.

2. William Cox, attorney for the applicant, Erling W. Yontz. Mr. Cox said that he did not receive the staff report until the February 19, 1997 hearing. He said that it was returned to the County with the wrong address. He said there have been several modifications to the application that affect the criteria and the staff report. Because some of the concerns arose late and because the County staff is willing to entertain an alternative driveway location he wants a continuance of the hearing. This site was previously approved for a residence and the partially cleared driveway proposed to be the access was part of the lapsed prior approval. The applicant thought that was were the County again wanted the driveway because that location would minimize the impact on the property. The applicant would move the access, but new information needs to be provided to demonstrate compliance with the Code criteria.

Mr. Cox said that the template test is the only real issue. The issue has been before the County in a previous case, *Evans v. Multnomah County*, LUBA No. 96-198, in which he was the applicant's attorney. State law requires only 3 homes within the template and they do not have to be within the template but can be on any of the parcels that make up the template. The County reversed the Hearings Officer's decision in *Evans*, interpreting that the County's template dwelling test controls. That question is now before LUBA. Mr. Cox believes that the County is wrong. He believes the intent of the legislature, and LCDC in writing the administrative rule, was as the Hearings Officer held in *Evans*. He argued that its difficult to meet all the setback, road length, road grade and topography standards. He believes that if the template test is met, those other standards can not be the basis for a denial. He argued that if the applicant meets the

State's template test and the application is denied based on County standards the County has taken the property.

3. Gary Shepherd, attorney for the applicant, submitted a document showing the location of the homes on the template. He said there are dwellings on Tax Lots 13 and 12, Section 10 2N2W, Tax Lot 3, Sec. 15 2N2W; and there are two homes on Tax Lot 20 Section 10 2N2W. The dwellings on Tax Lots 3 and 20 are not within the 160 acre template but are on the parcels that are within the 160 acre template. He argued that the state test provides an alternative method of meeting the template test which involves a rectangle one (1) mile long and a quarter mile wide, Exhibit G3. There are more than enough dwellings to meet the State template test. He argued that the purpose of the State test is to make sure that the dwellings are along the roadway, to limit the amount of dwellings that are set back from the roadway and to concentrate development. He testified that there are at least 11 other lots or parcels and more than 3 dwellings that existed on January 1, 1993 with the 160-acre rectangle. Exhibit G2.

4. Hearings Officer Won asked about the alternative template rectangle. That law says a county "may," on what basis does Mr. Cox argue that the County "shall" approve a dwelling under that provision? Mr. Cox responded that the option belongs to the applicant.

5. Chris Foster, 15400 N.W. NcNamee Road, submitted Exhibit G4 in which he argued that the lot was not a lawfully created parcel. The parent parcel from which Tax Lot 23 was created was Tax Lot 13 which originally consisted of approximately 20 acres. The staff said that the former MUF zone created the lot because there was a road division. The Code section on Lot of Record grants grandfather rights to pre-1980 lots. It says that when the Comprehensive Plan was first adopted this area had been zoned for two (2) acres. He argued the Code grandfathered all the previously created lots and gave them development rights. The staff has interpreted this as a tool to create still more lots. He thinks the staff has misread the Code. Code section .2182(c) says:

> "Except as otherwise provided by MCC .2180, .2184 and .7720(A), no sale or conveyance of any portion of a lot, other than for a public purpose, shall leave a structure on the remainder of the lot with less than the minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district."

Mr. Foster testified that in 1986 Tax Lot 13 already had a dwelling on it. Therefore, a substandard lot was created in 1988 when Tax Lot 23 was created by recording a deed. The Code section that supposedly authorizes the lot, Code section .2182(B)(2) says that "Separate Lots of Record shall be deemed created when a County maintained road... intersects a parcel...". Mr. Foster contended however, that subsection .2182(B)(2) is a subset of an aggregation requirement. He argued the lot of record is a premier issue and precedes the question of which template dwelling test to apply.

6. Arnold Rochlin, PO Box 83645 Portland, Oregon, testified that the Staff Report has been available since February 12, 1997. There is no requirement in the Code or the Statute that it be mailed to anyone. Its only required that it be available.

Mr. Rochlin submitted a Copy of the MUF zone provisions that were applicable between 1980 and 1990 when the subject tax lot was created, Exhibit G5. Mr. Rochlin submitted written testimony, Exhibit G1. On page 3 he wrote that former Code section .2182(C) is not relevant.

He is corrected by Mr. Foster and retracts that statement. The two lots contain approximately 5 acres and 15 acres respectively. The MUF zone from 1980 to present required a minimum lot size of 19 acres. The staff believes that the lot met all the requirements when it was created. The 5 acre Tax Lot 23 did not meet the minimum lot size standard.

Concerning the template issue, Mr. Rochlin relies on written testimony already in the record. He responded to the applicant's testimony about the rectangle template. The applicant argues that because the statute does not say that a county may prohibit the use of such a template there's an implication that its allowed. The basic thrust of the forest provisions at ORS 215.705 through 215.750 is that it is permissive. These State provisions allow the County to allow dwellings that meet certain minimum State standards. He argued that as in *Dilworth v. Clackamas County* these State standards do not prohibit the County from applying stricter standards. He said there may be some argument about how and when the County may express its stricter standards but there is not argument that the County has the authority to adopt stricter standards. On the question of whether the County's standards adopted before the State statute and Administrative Rules, *Blondeau v. Clackamas County* which is further defined by *DeBates v. Clackamas County*, qualifies the permissiveness of the County regulations, holding that when a County relies on farm use regulations implementing ORS 215.283 and specifically protecting farm lands, a county can not rely on local regulations enacted before the State statutes and OARs. At the very least they have to re-enact those regulations. This qualification relates only to the farm lot of record provisions. Mr. Rochlin says that the permissive intent of ORS 215.283 to 215.705 is shown by contrasting the language in those sections with the language in ORS 215.283(1). The latter section says "the following uses may be established in any area zoned for exclusive farm use." The Supreme Court held in *Brentmar* that the ORS 215.283(1) language is ambiguous because of the use of the passive voice "uses may be established." That language contrasts with the language in ORS 215.705(1) which says "the governing body of the County or its designate may allow the establishment of a single family dwelling." He argued that the language difference can't be a coincidence, its as though the legislature expressly removed the ambiguity in ORS 215. 283 and 215.213. He contended the legislature changed the language from the passive voice to make it clear that the authority to allow is granted to the County and not to the owners of property.

Mr. Rochlin testified that ORS 215.750(4) says "a proposed dwelling is not allowed (a) if it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law." The County's regulations for templates are acknowledged. The County's regulations require that the template be a square, it does not authorize it to be a rectangle. They require that the template be oriented along section lines, they do not allow it to be rotated. They require that the qualifying existing dwellings be within the template not merely on parcels part of which are within the template. They make no mention of any requirement of existence in 1993. He argued that the implication of this is that the County may not require 5 dwellings in existence in 1993 because the County's regulation doesn't require it and State standards require only 3 dwellings in 1993. The template standards of the State and County must both be applied. He agrees with the applicant that ORS 215.646 requires the direct application of State standards when the County has failed to implement it, but argued that nothing in that statute says anything about nullifying County regulations. He said that if you try to implement the statute the way the applicant suggests you would fall into an administrative morass because there would be no way to determine which County regulations the legislature intended to nullify and which ones it did not.

7. Jeff Buck, 23802 N.W. Moreland Road, owner of Tax Lot 13. He doesn't think that the application meets either the State or the County template test. He thinks there are only two (2) dwellings within the template. The "dwelling" on Tax Lot 17 is not a dwelling. According to the tax records it is worth only $200.00, Exhibit G8. He submitted photos of the structure, Exhibits G6 & G7. He said there is a dwelling on Tax Lot 19, but he doesn't think it should count because it was put in March, 1993, it did not exist on January 1, 1993. He testified that there are two dwellings within the 160-acre template, his dwelling on Tax Lot 13 and his neighbor's dwelling on Tax Lot 12. He submitted tax records for Tax Lot 19, Exhibit G9. He feels that both the State and County rules should apply. He agrees that the State statute requires that local regulations also apply.

8. Michael Hubbard, a neighbor, believes that the template needs to be parallel to section lines. He understands that the dwelling will force changes or significantly affect surrounding farm and forest practices. He thinks that it is common sense that the ability to conduct those activities will be affected without an adequate buffer and he argued that a 5-acre tract can not create an adequate buffer.

9. A letter from Gordon Larsen, owner of Tax Lots 12 and 25, was read into the record, Exhibit F1. He believes that the number of existing dwellings in the template test is not satisfied and he is concerned about the effect on wildlife habitat.

10. Mr. Cox desires a continuance to respond to the new information on the lot of record question, to submit additional evidence on the driveway and access length, and to submit the plaintiff's brief in *Evans*. Mr. Cox agreed to extend the 120 days for the period of the continuance which the Hearings Officer set for two (2) weeks. According to the County staff this room will be available at 4:00 on March 5. The hearing was continued for information on the issues of whether the lot is a lot of record, what template dwelling test(s) apply, the driveway access point and length, and impact of the proposed use on forest practices in the surrounding areas.

III. STANDARDS AND CRITERIA, FINDINGS OF FACT AND EVALUATION OF REQUEST

A. Conditional Use Permit Request for Template Dwelling

1. Under the County Code a "template dwelling" may be approved as a conditional use permit in a Commercial Forest zone when it is found to satisfy the standards of the Multnomah County Code, MCC 11.15.2050(B). The standards are in subsections .2052 and .2074. Section 11.15.2052 contains the siting criteria and 11.15.2074 contains development standards.

At issue is whether the County code or the State standards in ORS 215 and OAR 660-06-027 apply to siting template dwellings. OAR 660 Division 6 was first adopted by LCDC in 1990 and was amended in 1990 and 1992. In December, 1991 Multnomah County amended its commercial Forest Use (CFU) zone to fully comply with State standards. The 1993 legislature amended ORS 215 to incorporate template dwelling provisions, effective November 1993. Following that amendment the County began to apply the County CFU standards. In 1995 LCDC amended OAR 660 Division 6. This application was filed on July 5, 1996. The Hearings Officer, in this order, will first address all the criteria that are alleged to apply to the conditional

use permit and conclude in subsection B with a discussion about which criteria are found by the Hearings Officer to apply.

1. OREGON REVISED STATUTES

ORS 215.750: Alternative forestland dwellings

(1) In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

(c) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:

(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and

(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels.

Finding. It is undisputed that the parcel is composed of soils that are capable of producing more that 85 cubic feet per acre per year of wood fiber. It is also undisputed that eleven parcels existed on January 1, 1993 within a 160- acre template. There were four dwellings that existed on parcels within the 160-acre template, two were within the template and two were outside of the template. These criteria are met.

(4) A proposed dwelling under this section is not allowed:

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law.

(b) Unless it complies with the requirements of ORS 215. 730

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under ORS 215.740(3) for other lots or parcels that make up the tract are met.

(d) If the tract on which the dwelling will be sited includes a dwelling.

Finding. The proposal complies with all requirements of the Multnomah County comprehensive plan and land use regulations except for the requirements of the County's template dwelling test which is more restrictive than the State's. OAR 660-06-027(5) defines "tract" as one or more contiguous property. No dwellings presently exist on the subject lot.

2. OREGON ADMINISTRATIVE RULES

Revisions to OAR 660-06 in 1995 have not to date been adopted by the county. Consequently, any requirements of the OAR that are not included in the county code, as well as any OAR requirements that are more restrictive than county code criteria, must also be applied to this proposal. The following OAR requirements are applicable:

OAR 660-06-027 (1)(d): In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are: (C) Capable of producing more than 85 cubic feet per acre per year of wood fiber if: (i.) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are

within a 160 acre square centered on the center of the subject tract; and (ii) At least three dwellings existed on January 1, 1993 on the other lots or parcels.

Finding. The OAR is the same as ORS 215.750. This OAR provision specifically allows a governing body of a county to establish in its zoning code provisions for approving the establishment of a single family dwelling. A county may or may not establish this provision. Multnomah county has adopted template dwelling provisions that are more restrictive than the State's. The proposal complies with the State's less restrictive standards.

The following parcels were verified by staff as sufficient to qualify both the template tests of the County and State:

Parcels Existing on January 1, 1993
within 160-Acre Square

Tax Map	Tax Lot
2N2W-10	19
2N2W-10	08
2N2W-15	02
2N2W-10	16
2N2W-10	17
2N2W-10	04
2N2W-10	14
2N2W-10	13
2N2W-10	12 (Now TL '25')
2N2W-10	20
2N2W-15	03

Parcels with dwellings (on January 1, 1993)
within 160-Acre Square

Tax Map	Tax Lot	Year Built
2N2W-10	13	1986
2N2W-10	12 (Now TL '25')	1962

The undisputed testimony of the applicant was that there are two dwellings that existed on January 1, 1993 on Tax Lot 20 which is within the template but the dwellings are outside of the template. Tax Lot 19, 2N2W-10 contains a structure within the 160-acre template. The City of Portland Bureau of Building records show that the building permit for the mobile home on Tax Lot 19 was applied for on January 4, 1993 (Exhibit E4) and the building permit was not issued until March 3, 1993 (Exhibit E5). This dwelling was not located on the parcel on January 1, 1993. Tax Lot '17' is identified in the tax records as containing a dwelling built in 1968 (Exhibit E6). The assessed value for all improvements on the site is $200.00. The structure is not habitable and it is questionable that the structure was ever a dwelling as it has only 400 square feet. Three dwellings did not exist on January 1, 1993 within the template on the other lots . However, there were at least three dwellings on January 1, 1993 on lots partially within the 160 acre template. According to the applicant there were two dwellings on Tax Lot 20, Section 10 2N2W. These criteria are met.

OAR 660-06-027(3): If the tract under section (1)(d) or (e) of this rule abuts a road that existed on January 1, 1993, the measurement may be made by creating a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road."

Finding. The following lots meet the 11 parcel requirement within the 160-acre rectangular template (Exhibit G2):

Parcels Existing on January 1, 1993
within 160-Acre Rectangle

Section	Tax Lot
2N2W 9	(T.L. # Not in Record)
2N2W 16	(T.L. # Not in Record)
2N2W 10	4
	8
	9
	12
	13
	14
	16
	17
	19
	20
	22

Regarding this criterion, the following dwellings met the 3 existing dwellings on January 1, 1993 requirement within the rectangular template:

Parcels with dwellings (on January 1, 1993)
within 160-Acre Rectangle

Section	Tax Lot
2N2W 10	9
	12
	13
	20 (2 dwellings)
	22
2N2W 15	16

OAR 660-06-027 (4): A proposed dwelling under this rule is not allowed :

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law;

Finding. The proposed template dwelling is prohibited by County Template dwelling standards that are more restrictive than the State's Template dwelling provisions.

(b)Unless it complies with the requirements of OAR 660-06-029 and 660-06-035;

Finding. The proposed access as modified minimizes the driveway length as required by OAR 660-06-029(C). This criterion is met.

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under section (6) of this rule for other lots or parcels that make up the tract are met;

Finding. The subject tract consists of one 4.68 acre tax lot. The applicant is only proposing to establish one dwelling on the subject tax lot. This criterion does not apply.

(d) If the tract on which the dwelling will be sited includes a dwelling.

Finding. The subject tract is currently vacant with no existing dwellings. This criterion is met.

OAR 660-06-029: **The following siting criteria or their equivalent shall apply to all new dwellings and structures in forest and agriculture/forest zones. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. A governing body shall consider the criteria in this rule together with the requirements OAR 660-06-035 to identify the building site:**

(1) Dwellings and structures shall be sited on the parcel so that:
(a) They have the least impact on nearby or adjoining forest and agricultural lands;

Finding. Please refer to the finding for MCC 11.15.2074(A)(1) for this OAR criteria.

(a) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;

Finding. Please refer to the finding for MCC 11.15.2074(A)(2) for this OAR criteria.

(a) The amount of forest lands used to site the access roads, service corridors, the dwelling and structures is minimized; and

Finding. Please refer to the finding for MCC 11.15.2074(A)(3) for this OAR criteria.

(a) The risks associated with wildfire are minimized.

Finding. Please refer to the finding for MCC 11.15.2074(A)(5) for this OAR criteria.

(2) Siting criteria satisfying section (1) of this rule may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

Finding. The dwelling is proposed to be located 78 feet from the centerline of N.W. Moreland road at its closest point, 200 feet from the west property line and 295 feet from the north property line within the minimum setback standards of the County Code. If the County Code applies to this application, it's requirements are met.

If the Commercial Forest Use zoning district template dwelling standards of the MCC are determined to be invalid there would be no siting criteria or setback standards for this type of dwelling. If the OAR's are determined to be the only applicable criteria, there would not be any building setback standards applicable to this application.

(3) The applicant shall provide evidence to the governing body that the domestic water supply is from a source authorized in accordance with the Water Resources Department's administrative rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices rules (OAR Chapter 629). For purposes of this section, evidence of a domestic water supply means:

(a) Verification from a water purveyor that the use described in the application will be served by the purveyor under the purveyor's rights to appropriate water; or

(b) A water use permit issued by the Water Resources Department for the use described in the application; or

(c) Verification from the Water Resources Department that a water use permit is not required for the use described in the application. If the proposed water supply is from a well and is exempt from permitting requirements under ORS 537.545, the applicant shall submit the well constructor's report to the county upon completion of the well.

Finding. The water supply will come from a well approximately 725 feet in depth 50 to 100 feet from the home site. No water lines across neighboring properties are necessary. No surface water is involved. This criterion is met.

(4) As a condition of approval, if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management, or the U.S. Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to accept responsibility for road maintenance.

Finding. Road access is from a County Maintained Road. This criteria does not apply.

(4) Approval of a dwelling shall be subject to the following requirements:

(a) Approval of a dwelling requires the owner of the tract to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements at the time specified in Department of Forestry administrative rules;

Finding. The applicant has not submitted a stocking plan. This requirement can be met at the time of review of the building permit.

OAR 660-06-035: **Fire Siting Standards for Dwellings and Structures: The following fire siting standards or their equivalent shall apply to new dwelling or structures in a forest or agriculture/forest zone:**

(1) The dwelling shall be located upon a parcel within a rural fire protection district or shall be provided with residential fire protection by contract. If the dwelling is not within a fire protection district, the applicant shall provide evidence that the applicant has asked to be included within the nearest such district. If the governing body determines that inclusion within a fire protection district or contracting for residential fire protection is impracticable, the governing body may provide an alternative means for protecting the dwelling from fire hazards. The means selected may include a fire sprinkling system, onsite equipment and water storage or other methods that are reasonable, given the site conditions. If a water supply is required for fire protection, it shall be a swimming pool, pond, lake, or similar body of water that at all times contains at least 4,000 gallons or a stream that has a continuous year round flow of at least one cubic foot per second. The applicant shall provide verification from the Water Resources Department that any permits or registrations required for water diversion or storage have been obtained or that permits or registrations are not required for the use. Road access shall be provided to within 15 feet of the water's edge for firefighting pumping units. The road access shall accommodate the turnaround of firefighting equipment during the fire season. Permanent signs shall be posted along the access route to indicate the location of the emergency water source.

Finding. The site is located within the Tualatin Valley Fire and Rescue District. Risks associated with wildfire are minimized as discussed under MCC Section .2074(A)(5), below. The applicant has received conditional approval from Tualatin Valley Fire and Rescue District. This criterion is met.

(2) Road access to the dwelling shall meet road design standards described in OAR 660-06-040.

660-06-040: Fire Safety Design Standards for Roads: The governing body shall establish road design standards, except for private roads and bridges accessing only commercial forest uses, which ensure that public roads, bridges, private roads and driveways are constructed so as to provide adequate access for fire fighting equipment. Such standards shall address maximum grade, road width, turning radius, road surface, bridge design, culverts, and road access taking into consideration seasonal weather conditions. The governing body shall consult with the appropriate Rural Fire Protection District and Forest Protection District in establishing these standards.

Finding. Multnomah County has established road design standards, which are contained under MCC Section .2074(D). Findings within this order, under MCC Section .2074(D), demonstrate compliance with the road design standards established by Multnomah County.

(3) The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area in accordance with the provisions in "Recommended Fire Siting Standards and Fire Safety Design Standards for Road" dated March 1, 1991 and published by the Oregon Department of Forestry.

Finding. Multnomah County has established primary and secondary fuel-free fire break standards, in compliance with "Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety design standards for Roads." Multnomah county verifies compliance with this standard at the building permit stage when the clearing has been completed. Refer to the finding for MCC 11.1.5.2074(A)(5) below. This criterion can be met.

(4) The dwelling shall have a fire retardant roof.

Finding. The applicant has not submitted building plans. Compliance with this criteria could be determined when the building permit is applied for. This criterion can be met.

(5) The dwelling shall not be sited on a slope of greater than 40 percent.

Finding. The proposed dwelling will be sited, in accordance with this requirement, on a slope less than 40%. The applicant submitted topographic contours on exhibit H4, showing the slopes on the dwelling site at 20% to 35%. This criterion is met.

(6) If the dwelling has a chimney or chimneys, each chimney shall have a spark arrested.

Finding. The applicant stated that any chimneys in the proposed dwelling will have spark arresters. The applicant has not submitted building plans. Compliance with this criteria could be determined when the building permit is applied for. This criterion can be met.

3. Multnomah County Code

MCC 11.15.2052 (A): A dwelling not related to forest management may be allowed subject to the following:

(1): The lot shall meet the lot of record standards of MCC .2062 (A) and (B) and have been lawfully created prior to January 25, 1990.

Finding. Tax Lot '23' was created in 1983. The zoning at that time was MUF-19. Under the MUF Lot of Record provisions, separate Lots of Record were deemed created when a County maintained road bisected a parcel. Code section .2182(C) said:

(B) A lot of Record which has less than the area or front lot line minimums required may be occupied by any permitted or approved use when in compliance with the other requirements of the district.

(2) Separate Lots of Record shall be deemed created when a County maintained road or zoning district boundary intersects a parcel of land.

I conclude that the County authorized the creation of the substandard parcel by the recordation of a deed. The lot of record provision was an exemption from the minimum lot size for the MUF zone. The "lot of record" concept allows owners of lots which were not created by governmental subdivision or partition approval to qualify for development and allows owners of property that does not meet current lot size requirements of the County code to develop their property.

The County adopted the first land division ordinance (Ord. 174) which began regulating some partitions in 1978. State law required major partitions (where a road is created) to be regulated but left it up to the local governments whether or not to regulate minor partitions. The minor partitions that Multnomah County regulated were designated "type 3 land divisions." (MCC 11.145.100; 1983 version). Type 3 partitions included partitions that had unusual characteristics such as flag lot, street widening or unusual shapes and size characteristics such as flag lot, street widening or unusual shapes and size characteristics. A minor partition which did not fit any of the type 3 characteristics were deemed "Minor Partitions Exempted." Minor partitions not listed in the Type 3 category were exempted from the provisions of this ordinance until at least 1989. The exemption did not exempt the creation of the lot from meeting the requirements of the code. The Code exempted lots bisected by a road from meeting the Code's dimensional requirements.

The partition that created the subject tax lot was, at the time of creation characterized by the County as a "minor partition exempted." In 1983 the owner of the property went to Multnomah County seeking a partition. It was the County's interpretation at that time, when a County road bisected a parcel, that the only thing a property owner needed to do to "legalize" the lot was record a new legal description of the property. The prior owner of Tax Lot 23 followed the procedure outlined by the County to create a legal lot of record by recording a new legal description. The reasoning of LUBA in *McKay Creek Valley Assoc. v. Washington Co.*, 24 Or LUBA 187 (1992), affirmed by the Court of Appeals on other grounds, is instructive here. LUBA said:

> "...under a local standard requiring that a lot or parcel shown to have been legally or properly created, it must be established that, at the time the lot or parcel was created, any local government **approvals** required at that time were given. *** such a standard does not require a complete reexamination of compliance with every approval standard that may have applied at the time the lot or parcel was created." (Emphasis in original.)

Property owners who came to the County seeking a partition due to the Lot of Record definition in the Multiple Use Forest zone, were told by the County staff that the only action necessary was for them to go to the County Recorder and record a new legal description for the parcel. Tax Lot 23 was created by recording a new legal description at the request of a previous property owner. Staff has reviewed the partition and it appears that it was classified as a "Minor Partitions Exempted". The prior property owner of Tax Lot 23 followed the procedure outlined by the County to create a legal lot of record by recording a new legal description. The subject property was thus lawfully partitioned.

A warranty deed dated 10/30/95 describing the site was recorded with the Multnomah County Recording Section on 10/30/95. (Exhibit 1). A memorandum of contract of sale describing the subject property dated 1988 was submitted. (Exhibit 2). The subject parcel is

approximately 4.5 acres in size, and satisfied applicable laws when created. The parcel is currently less than 80 acres in size and, thereby, does not meet the current minimum lot size in the CFU zone. The applicant does not own contiguous property, either in CFU or EFU zoning. These findings demonstrate that the subject parcel satisfies the lot of record standards of MCC .2062(A) and (B), and was lawfully created prior to January 25, 1990.

(2) The lot shall be of sufficient size to accommodate siting the dwelling in accordance with MCC.2074 with minimum yards of 60 feet to the centerline of any adjacent County Maintained road and 200 feet to all other property lines. Variances to this standard shall be pursuant to MCC .8505 through .8525, as applicable;

Finding. The application complies with the siting standards of MCC .2074 as discussed below.

(3) The lot shall meet the following standards:

(C) The lot shall be composed primarily of soils which are capable of producing above 85 cf/ac/yr of Douglas Fir timber; and
(i) The lot and at least all or part of 11 other lots exist within a 160-acre square when centered on the center of the subject lot parallel and perpendicular to section lines; and
(ii) Five dwellings exist within the 160 acre square.

Finding. According to the Multnomah County Soil Survey the soils on the subject property are Cascade Silt Loam (&C, 7D, and 7E). The soils have a Site Index of 157, which translates into a yield of approximately 153 cubic feet per acre per year. (Exhibit 4). The applicant demonstrated the existence of 12 other lots within a 160 acre square centered on the center of the subject lot parallel and perpendicular to section lines. (Exhibit 5). The applicant has not demonstrated that five dwellings exist within a 160-acre square centered on the center of the subject lot parallel and perpendicular to section lines. The evidence shows that three dwellings, not five, exist within the template: Tax Lots 12, 13 and 19, Section 10 2N2W. Thus, the County's Template dwelling requirements, which are more restrictive than the State's are not met.

(d) Lots and dwellings within urban growth boundaries shall not be counted to satisfy (a) through (c) above.

Finding. No lots within the urban growth boundary were counted to satisfy the existing lots or dwellings in the template.

(e) The lot is not capable of producing 5,000 cubic feet of wood fiber per year from commercial tree species recognized by the Forest Practices Rules.

Finding. The lot is not capable of producing 5,000 cubic feet of wood fiber per year from commercial tree species recognized by the Forest Practices Act. According to the Multnomah County Soil Survey the soils on the subject property are Cascade Silt Loam (7C, 7D, 7E). The soils have a Site Index of 157, which translates into a yield of approximately 153 cubic feet per acre per year. Applicant's property consists of only 4.68 acres.

(4) The dwelling will not force a significant change in, significantly increase the costs of, or impede accepted forestry or farming practices on surrounding forest or agricultural lands.

Finding. The Moreland Road area's predominate land use and zoning is Commercial Forest. There are numerous large parcels which are dedicated to forest practices. Within the 160 acre square template, only 3 dwellings exist. Seven of the template parcels are in forest practices with Tax Lots '8', '2', '16', '17', and '14' Section 10 2N2W being held by lumber companies. The approval of a dwelling on this lot will be the first dwelling on the west side of Moreland Road within the immediate vicinity.

Uses on the site will include normal residential activities and forest practices. The majority of the applicant's property is adjacent to and borders a County road. A Bonneville Power Administration (BPA) Transmission right-of-way crosses the southwest corner of the property and serves as a buffer, shielding applicant's property from the surrounding properties. It has not been shown that the construction of the dwelling will significantly impede or increase the costs of farm or forest operation on other parcels.

(5) The dwelling will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife, or that agency has certified that the impacts of the additional dwelling, considered with approvals of other dwellings in the area since acknowledgment of the Comprehensive plan in 1980, will be acceptable.

Finding. According to the Comprehensive Plan findings on wildlife habitat, the Oregon Department of Fish and Wildlife maps do not list this area among sensitive areas important to the survival of big game. This criterion does not apply.

(6) The proposed dwelling will be located on a lot within a rural fire protection district, or the proposed resident has contracted for residential fire protection.

Finding. The property is within the boundary of the Tualatin Valley Fire and Rescue District (formerly under Multnomah County Rural Fire District #20 until merger with Tualatin Valley). Applicant has received conditional approval from Jerry Renfro at Tualatin Valley Fire & Rescue Fire Prevention. This criterion can be met.

(7) Proof of a long-term road access use permit or agreement shall be provided if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of forestry, the Bureau of Land Management or the United States Forest Service. The road use permit may require the applicant to agree to accept responsibility for road maintenance.

Finding. The parcel is served by access from NW Moreland Road, a public roadway. This criterion is met.

(8) The parcel on which the dwelling will be located has been disqualified from receiving a farm or forest deferral.

The following OAR requirement supersedes the above requirement to disqualify the property from farm or forest deferral. If the property is planted to Department of Forestry standards then the property can be retained or added onto tax deferral programs.

[OAR 660-06-029(5) and Senate Bill 245 (1995 session): Approval of a dwelling shall be subject to the following requirements:

(a) Approval of a dwelling on a lot, parcel, or tract 10 acres or more shall require the owner of the tract to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements at the time specified in Department of Forestry administrative rules.

(b) The planning department shall notify the county assessor of the above condition at the time the dwelling is approved.

(c) The property owner shall submit a stocking survey report to the county assessor and the assessor shall verify that the minimum stocking requirements have been met by the time required by Department of Forestry Rules. The assessor shall inform the Department of Forestry in cases where the property owner has not submitted a stocking survey report or where the survey report indicates that minimum stocking requirements have not been met.

(d) Upon notification by the assessor the Department of Forestry shall determine whether the tract meets minimum stocking requirements of the Forest Practices Act. If the department determines that the tract does not meet those requirements, the department shall notify the owner and the assessor that the land is not being managed as forest land. The assessor shall then remove the forest land designation pursuant to ORS 321.359 and impose the additional tax pursuant to ORS 321.372.]

Finding. According to the Multnomah County Assessment records, the parcel is not receiving farm or forest deferral. Upon approval of this proposal by Multnomah County, the applicant stated he will comply with the stocking requirements established by OAR 660-06029(5). This criterion can be met.

(9) The dwelling meets the applicable development standards of MCC.2074; (as follows:)

Finding. The applicant has demonstrated that the project, as revised, meets the standards of MCC .2074.

MCC .2074 - Development Standards for Dwellings and Structures: Except as provided for the replacement or restoration of dwellings under MCC .2048 (E) and .2049 (B), all dwellings and structures located in the CFU district after January 7, 1993, shall comply with the following:

(A) The dwelling or structure shall be located such that:

(1) It has the least impact on nearby or adjoining forest or agricultural lands and satifies the minimum yard and setback requirements of .2058 (C) through (G);

Finding. The proposed location of the dwelling meets the minimum setbacks of 200 feet from the rear and side lot lines and 60 feet from the centerline of a County maintained road. The Moreland Road area's predominate land use and zoning is Commercial Forest. There are numerous large parcels which are dedicated to forest practices. Within the 160 acre square template, only three dwellings exist. Theses three dwellings are located on the east side of N.W. Moreland Road. Seven of the template parcels are in forest practices with Tax Lots, '2', '8', '14', '16', and '17' being held by lumber companies.

Some of the surrounding smaller lots are developed with farm and forest dwellings, while the larger parcels in the area are utilized for forestry purposes. Forest practices include road building prior to harvest, timber harvest stock piling, and burning of slash subsequent to harvest, replanting, spraying of herbicides and pesticides, and periodic thinning requiring the use of heavy equipment such s bulldozers, skidders, yarders, loaders and trucks. Chain saws are also used in harvesting and thinning operations Replanting is accomplished by using hand labor, as is trimming and some early thinning of the stand. Spraying in areas with moderate residential density on nearby lands is normally accomplished from the ground. Effects from these activities include noise from heavy equipment and chain saws during harvest and thinning operation, smoke from slash fires, limited spray drift from herbicide applications subsequent to harvest and replanting and period appearances by persons involved in ongoing stand management.

The majority of the applicant's property is adjacent to and borders a county road. A Bonneville Power Administration (BPA) Transmission right-of-way crosses the southwest corner of the property and serves as a buffer, shielding applicant's property from the properties to the west.

The applicant selected a site relatively close to N.W. Moreland Road which concentrates any impacts of the dwelling towards an area where impacts are already occurring and away from the wooded portions of applicant's property and forest lands to the west and north.

The location of the proposed dwelling will have the least impact on nearby or adjoining forest and agricultural lands.

(2) Forest operations and accepted farming practices will not be curtailed or impeded.

Finding. Sections MCC 11.15.2074 (A)(1) and (2) contain language similar to that found in Section MCC 11.15.2052 (A)(4). The standards are both intended to ensure dwellings not related to forest practices will not significantly conflict with nearby or adjoining farm/forest practices. Subsection (A)(1) requires that the dwelling site has the least impact on the adjoining farm or forest lands while this subsection requires that farm and forest practices will not be curtailed or impeded.

To the extent that the secondary fire safety zone is not contained within the parcel, there is some potential effect on forest practices on Tax Lot 13. The roads accessing the surrounding properties used for timber production are in place. So, it is likely no further road construction will take place in the surrounding area. To the east is N.W. Moreland Road which is available for hauling logs and forest products from the surrounding area. The location of the dwelling will not affect these activities on N.W. Moreland Road. There is no evidence in the record that this development will impact, curtail or impede farm/forest lands, operations or accepted practices.

(3) The amount of land used to site the dwelling or other structures, access roads, and service corridor is minimized.

Finding. Within the CFU District, required setbacks for structures consist of 60 feet from the centerline of a County Maintained road and 200 feet from all other property lines. The revised site analysis map, Exhibit H4, locates the proposed building site within the small triangular area in the southeast portion of the site where the required setbacks can be met. Within the buildable area slopes range from 20% to 35%. The dwelling is proposed to be sited on the flattest area. This site is 78 feet from N.W. Moreland Road, 200 feet east of the west property line and 295 feet south of the north property line. The amount of land used for the residence could be further minimized by moving the home site south, but that would result in further reducing the site's ability to contain primary and secondary fire safety zones.

The applicant has relocated the driveway to the home site to the southern portion of the property. The proposed driveway extends west from N.W. Moreland Road at a point approximately 105 feet, then curves northeast toward the home site for an estimated 90 feet where it terminates in a hammerhead turnaround. The total length of the driveway is an estimated 240 feet. The driveway has an overall grade of 4.56%, with the maximum grade being 8.85% for a 26.5 foot long segment. The driveway is designed and located to meet the County and Fire District standards for grade limitations, turnarounds, turn/curve radius travel surface width, clearance, etc. as well as to minimize the amount of land used for the roadway.

The applicant originally proposed to access the proposed home site by means of a driveway that is already partially cut and cleared from the northeast corner of the site. The applicant changed the proposed access closer to the proposed dwelling reducing the length of the access required and eliminating the need for a 48 foot minimum curve turnaround. The alternate access location minimizes the amount of land devoted to the dwelling, access roads, and service corridor.

(4) Any access road or service corridor in excess of 500 feet in length is demonstrated by the applicant to be necessary due to physical limitations unique to the property and is the minimum length required; and

Finding. The proposed revised access to the home site is approximately 240 feet, less than 500 feet in length. This criterion does not apply.

(5) The risks associated with wildfire are minimized. Provisions for reducing such risk shall include:

(a) Access for a pumping fire truck to within 15 feet of any perennial water source on the lot. The access shall meet driveway standards of MCC .2074 (D) with permanent signs posted along the access route to indicate the location of the emergency water source;

(b) Maintenance of a primary and secondary fire safety zone;

(i) A primary safety zone is a fire break extending a minimum of 30 feet in all directions around a dwelling or structure ....

(ii) On lands with 10 percent or greater slope the primary fire safety zone shall be extended down the slope from a dwelling or structure as follows:

Percent Slope	Distance in Feet
Less than 10	Not Required
Less than 20	50
Less than 30	75
Less than 40	100

(iii) A secondary fire safety zone is a fire break extending a minimum of 100 feet in all directions around the primary safety zone... .

(iv) No requirement in (i), (ii) , or (iii) above may restrict or contradict a forest management plan approved by the state of Oregon Department of Forestry pursuant to the state Forest Practices Rules; and

(c) The building site must have a slope less than 40 percent.

Finding. When fully cleared and graded the driveway can meet all applicable Multnomah County and Fire District standards. The applicant intends to maintain a supply of water to the site through a well. The applicant also intends to have on site a water storage facility with hoses and operable gas driven pump to aid in the case of a fire emergency. The applicant submitted a revised site analysis map, Exhibit H4, showing 35% slope in the steepest area around the home site. This site plan shows 75 feet of primary and 100 feet of secondary fire safety zones. The 75 foot primary safety zone is not provided totally within the site, but extends into N.W. Moreland Road. The 100 foot secondary fire safety zone impinges on forestry practices on Tax Lot 13, across N.W. Moreland Road. The applicant indicates his intention in his answer to MCC 11.1.5.2074(A)(3) "... to leave the firs standing". Where or what trees the applicant intends to leave are not illustrated on the revised site plan (Exhibit H4) or any other exhibit. The applicant has not demonstrated that the spacing of these trees will meet the spacing requirement contained in MCC 11.15.2074(A)(5)(b)(i).

Vegetation on the site will buffer the residence from farm and forestry activities on surrounding land, except to the southeast where the primary safety zone requires clearing. The BPA high voltage utility lines and easement are located between the proposed dwelling and farm and forest uses to the west providing a further buffer. These utility lines cross the subject property would prevent any spraying by air.

(B) The dwelling shall:

(1) Comply with the standards of the Uniform Building Code or as prescribed in ORS 446.002 through 446.200 relating to mobile homes;

(2) Be attached to a foundation for which a building permit has been obtained; and

(3) Have a minimum floor area of 600 square feet.

Finding. No building plans have been submitted to verify that the dwelling will comply with the above requirements. The site plan shows a 75 x 55 foot area which contains 4,125 square feet. Under the provisions of MCC 11.15.7820 this application will be required to go through the Design Review process. The applicant has not submitted the detailed plans required to make a statement regarding the color and lighting specifics of this application. This can be addressed at the Design Review stage. These criteria can be met.

(C) The applicant shall provide evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources Oregon Administrative Rules for the appropriation of groundwater (OAR 690, Division 10) or surface water (OAR 690, Division 20) and not from a class II stream as defined in the Forest Practices Rules. If the water supply is unavailable from a public source, or sources located entirely on the property, the applicant shall provide evidence that a legal easement has been obtained permitting domestic water lines to cross the properties of affected owners.

Finding. Applicant has submitted a letter from A.M. Jannsen Well Drilling Company (Exhibit A9). The water supply will come from a well approximately 725 feet in depth 50 to 100 feet from the homesite. No water lines across neighboring properties are necessary. No surface water is involved. OAR 690, Division 10 deals with critical groundwater areas; this is not a critical groundwater area and the rules do not apply. OAR 690, Division 20 deals with surface water and does not apply.

(D) A private road (including all easements) accessing two or more dwellings, or a driveway accessing a single dwelling, shall be designed, built, and maintained to:

(1) Support a minimum gross vehicle weight (GVW) of 52,000 lbs. Written verification of compliance with the 52,000 lb. GVW standard from an Oregon Professional Engineer shall be provided for all bridges or culverts;

(2) Provide an all-weather surface of at least 20 feet in width for a private road and 12 feet in width for a driveway;

(3) Provide minimum curve radii of 48 feet or greater;

(4) Provide an unobstructed vertical clearance of at least 13 feet 6 inches;

(5) Provide grades not exceeding 8 percent, with a maximum of 12 percent on short segments, except as provided below;

(a) Rural Fire Protection District No. 14 requires approval from the Fire Chief for grades exceeding 6 percent;

(b) The maximum grade may be exceeded upon written approval from the fire protection service provider having responsibility;

(6) Provide a turnaround with a radius of 48 feet or greater at the end of any access exceeding 150 feet in length;

(7) Provide for the safe and convenient passage of vehicles by the placement of:

(a) Additional turnarounds at a maximum spacing of 500 feet along a private road; or

(b) Turnouts measuring 20 feet by 40 feet along a driveway in excess of 200 feet in length at a maximum spacing of ½ the driveway length or 400 feet whichever is less.

Finding. Access to the proposed home site will be by means of a driveway that must meet all applicable Multnomah County and Fire District standards. The applicant stated the driveway will be improved and maintained to support a minimum gross vehicle weight of 52,000 pounds; no bridges or culverts will be constructed; the driveway will have an all-weather surface at a minimum of 12 feet wide; all curves will have a minimum curve radii of 48 feet; the driveway will have an unobstructed vertical clearance of 13 feet 6 inches or greater. According to the applicant's revised site plan analysis, one 26.5 foot segment of the road has a

8.95% grade. Review of compliance with these criteria can be finalized at the building permit stage to assure compliance with the criteria. These criteria can be met.

(10) A statement has been recorded with the Division of Records that the owner and the successor in interest acknowledge the rights of owners of nearby property to conduct forest operations consistent with Forest Practices Act and Rules, and to conduct accepted farming practices.

Finding. No evidence has been submitted that a statement complying with MCC 11.15.2052(A)(10) has been recorded. Recordation of the required statement could be a condition of approval and assured at the building permit stage. This criterion can be met.

B. At issue are differences between ORS 215, effective in November 1993, OAR 660-06-027(1)(d)(C), effective on March 1, 1994 and MCC 11.15.2052(A)(3)(c), effective in 1992. The question is whether the County Code's template dwelling provisions, which were adopted before the legislative and OAR 660, Division 6 template dwelling provisions were adopted, apply as well as state law or whether only the legislative enactment as interpreted by the administrative rule apply. The applicant does not dispute that the County regulations are not met. The applicant only contends that the County regulations do not apply.

a. The primary directives for determining applicable standards are ORS 197.175(2)(d), ORS 215.416(4) and (8) and ORS 197.646(1) and (3).

(1) **ORS 197.175. Cities' and Counties' planning responsibilities; rules on incorporations; compliance with goals.**

(2) Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions I compliance with the acknowledged plan and land use regulations;...

(2) **ORS 215.416. Application for permits;...**

(4) The application shall not be approved if the proposed use of land is found to be in conflict with the comprehensive plan of the county and other applicable land use regulation or ordinance provisions...

(8) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county...

(3) **197.646. Implementation of new or amended goals, rules or statutes.**

(1) A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning

goals, commission administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. Any amendment to incorporate goal, rule or statute change shall be submitted to the department as set forth in ORS 197.610 to 197.625. [post acknowledgment procedures]

(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions....

b. The applicant argues that ORS 197.646(3) says a new state law or rule applies directly until the County adopts that new standard into the County Code. The County had not adopted the State standards when this application was filed. The applicant argued that only the State law applies directly to this application, as petitioner argued in *Evans* and that the previously enacted County Code does not apply..

The applicant's attorney argued in *Evans* that after state laws are amended, local governments are required to amend their regulations. The applicant contends that ORS 197.646 states that when a local government does not adopt land use regulations to implement amended state administrative rules when those rules become applicable the amended rules shall be directly applicable to the local government's land use decision, and further contends that only the state rules are applicable.

The applicant disputes the County's claim that the County regulations that are stricter than the state law and administrative rules are also applicable, arguing that the County tried to add an exception to the statute that both apply. The applicant argues that the plain language of the statute must be construed to mean what it says; if the legislature had wanted the statute to read, as the County contends it does, the legislature would have included terms such as "more restrictive" or "less restrictive" in ORS 197.646(l). Rather than ending with "when such goals, rules, or statutes become applicable to the jurisdiction," the statute would need to read "when such goals, rules, or statutes are more restrictive than local regulations."

The applicant argues that *Dilworth v. Clackamas* County does not apply because the decision was not related to ORS 197.646. In *Dilworth,* Clackamas County denied a forest template dwelling application because the applicant did not meet Clackamas County requirements that the dwellings exist at the time of the application. LUBA considered ORS 215.750 because it does not require that the other dwellings exist on the date of application but only on January 1, 1993. LUBA held that a county is not precluded from regulating the establishment of dwellings more stringently than is required under ORS 215.750.

Dilworth did not challenge the County's authority to set standards more stringent than those in the statute, nor did *Dilworth* address the issue of whether preexisting more restrictive County regulations apply after state law addressing similar subject matter is amended.

The applicant argued that the hearings officer should consider *Blondeau* for the proposition that the legislature intended that the state template dwelling criteria should be the only applicable criteria. At the time of Blondeau's application for a farm dwelling, "lot of record" farm dwellings had been authorized by ORS 215.705, but not by County regulations which had not been updated

after the enactment of the statute. The County denied the farm dwelling application because it did not comply with previously adopted county standards adopted to satisfy a previous statutory prohibition against non-farm dwellings on prime farm lands.

LUBA held that the County could not deny the dwelling because it hadn't updated its code to comply with the new law. LUBA interpreted ORS 215.705(5) as allowing the county to deny the non-farm dwelling only by enacting or reenacting local legislation. Addressing the statutory context, LUBA found that ORS 215.705(l)(c) does not prohibit the application of stricter local land use regulations, but that ORS 215.705(5) allows a county to adopt stricter ordinance standards than ORS 215.705. LUBA found that for both sections to have meaning, subsection .705(5) implies a requirement of subsequent enactment for the county regulation to be effective. Addressing the legislative intent, LUBA found that the legislature intended to allow counties to approve lot of record dwellings under ORS 215.705 without first requiring amendments to their plans and regulations. This legislative intent would be impossible to achieve if ORS 215.705(l)(c) requires lot of record dwellings to comply with plan and regulation provisions previously adopted to protect agricultural soils. LUBA held that ORS 215.705(l)(c) does not allow a county to deny a lot of record dwelling because it fails to comply with more restrictive code provisions previously adopted to implement ORS 215.283(3) (1991) or with comprehensive plan provisions generally requiring protection of agricultural land.

The applicant agrees that *Blondeau* isn't on point in forest zones because it concerned farm zones. In the state farm zone lots of record provisions there is a specific prohibition that says that a County has to re-adopt their ordinances if the County wants to apply additional criteria to lots of record. There isn't a similar provision in the forest-land provisions. But, the applicant argued that the Hearings Officer should take the idea from *Blondeau* and consider legislative intent. The argument is that the legislature intended counties to use the State's forest-land dwelling provisions as provided in the State statute. No other forest land dwellings are allowed.

The applicant argues that ORS 197.646 was an attempt by the legislature to promote uniformity in the regulation of land use activities and to prevent inconsistencies among County codes from interfering with the State's attempt to regulate forest land uses. Essentially the applicant argued that when the legislature addresses a subject it preempts local governments from adopting different more restrictive regulations on that subject. The applicant cites no authority for this proposition.

C. Mr. Rochlin said that ORS 215.705 and 215.750 begin by saying that "counties may allow the following uses." He argued that the provisions of ORS 215.705 and 215.704 are contrasted with ORS 21 5.283 or 21 5.213 which start out using the passive voice saying "uses may be allowed" which led the Supreme Court to rule that under that language the uses that may be allowed must.be allowed by the county. *Brentmar v. Jackson County,* 321 Or 481 P2d 1030 (1995). Mr. Rochlin argued that the language applicable here is completely distinguished removing the ambiguity.

He argued that there are other provisions, for example ORS 215.750(4), that provide that dwellings can't be allowed if they conflict with the County's plan or land use regulations. He discussed *Blondeau* arguing that in *DeBates v. Clackamas County,* ORLUBA , (LUBA No. 96-100 01/03/97) the court held that the application of *Blondeau* is very limited to requiring that counties reenact any legislation if they want to prohibit nonfarm lot of record dwellings. He said that if a County's lot of record regulations had been adopted only to enforce ORS 215.283

intended specifically to preserve farm land then they would have to reenact those provisions to make the more restrictive regulations effective. Mr. Rochlin said that the court in *DeBates* very carefully pointed out that *Blondeau* is limited to just the lot of record farm regulation. He said the reason for that is that ORS 215.705, which addresses farm dwellings, has two provisions, one of which can be interpreted to require re-enactment of regulations. He said that ORS 215.750 doesn't have a comparable provision; 215.750 simply has the general statement that dwellings may not be allowed if they conflict with county regulations.

The Multnomah County Board of Commissioners, in *Evans v. Multnomah County, has* considered its interpretation of ORS 197.646(3). The Board of County Commissioners rejected Evan's argument that only the OAR applies and concluded that both the County regulations and the OAR apply.

The County argues that the context of ORS 197.646(3) includes 197.175(2) and 215.416(8) which require a local government to make land use decisions in compliance with the local government's acknowledged regulations and comprehensive plan. The County's plan and regulations are acknowledged. The County argues that the applicant tries to add a provision to ORS 197.646(3) that would extinguish County regulations, but that ORS 197.646(3) only requires that the relevant statutes and OAR be applied directly.

The County argues that reliance on only the state law and rules would be impossible to administer and that if the OAR is the only applicable criteria this application would not comply with the rule's requirement of compliance with an acknowledged comprehensive plan or land use regulations because there would be no local provision allowing a template dwelling. Addressing the argument that new state law extinguishes preexisting local regulations, the County says that it would be impossible to determine which local law remains applicable and which is extinguished. The problem of knowing which county regulations are extinguished by state law is avoided by applying both local and state requirements whenever county regulations have not been updated to reflect amended state requirements. Even if this results in applying standards unnecessarily by mistake, the method does not lead to erroneous determinations of compliance, because state law will alter the result only when the county regulation does not satisfy state law. The mandate of the statute is achieved, while preserving the meaning of ORS 197.1 75(2)((d) and (e) and 215.416(8) by applying the relevant state rules in addition to the relevant county regulations, setting aside a county rule only if it is inconsistent with a state rule.

The County argued that LUBA agreed in *Dilworth* that a local government can implement a non-forest dwelling regulation stricter than those found in the OAR and state statute. The option of stricter local regulation is the express intent of the legislature. ORS 215.750(4)(a) provides that the template dwellings allowed by the section may be prohibited by provisions in local regulations. The County did not introduce Dilworth to define ORS 197.646 but rather to argue that local governments can implement local regulations stricter than state requirements.

The County argued that the only authority for the interpretation that the State's not the County's template test applies is *Blondeau.* The County argues that *Blondeau* does not apply here because (1) that case concerned lot of record provisions for non-farm dwellings for agricultural lands (ORS 21 5.705) whereas this case concerns template dwelling provisions for forest lands (ORS 21 5.750), (2) while in *Blondeau* Clackamas County had not addressed lot of record provisions Multnomah County has addressed template dwellings in its regulations, and (3)

in *Blondeau* LUBA relied on ORS 215.705(5) for its decision that a local government cannot rely on previously acknowledged code provisions when a statute is subsequently amended whereas ORS 21 5.750 does not contain similar language. The County therefore concludes that *Blondeau* does not prevent the County from relying on both its already acknowledged standards as well as subsequently amended statutes and administrative rules.

The County argued, and the applicant agrees, that *Blondeau* concerns only farm zone dwellings and ORS 215.705, and not forest zone dwellings or ORS 21 5.750 which applies to this case. ORS 215.750(4)(a) like ORS 215.705(l)(c) disallows a dwelling prohibited by, or not complying with, local regulations. ORS 215.705(5) has no counterpart in 215.750. Therefore there is nothing in ORS 215.750 that requires local reenactment of template dwelling provisions for a County to deny a non-forest dwelling for failure to comply with county regulations.

The County further argues that the statute and the administrative rule allow for a local government to apply its own standards. ORS 215.750 says that a County "may" allow a dwelling in a forest zone under the standards that follow in the statute. The statute does not say a County "must" use those standards. This, combined with no wording having been inserted into ORS 197.646(3) negating the effect of a previously adopted and acknowledged county code allows a county to apply its stricter standards.

Finally, the County has an April 30, 1996 letter from the Department of Land Conservation and Development in which the DLCD staff disagrees with the argument that the county may not apply its more stringent standards in addition to the applicable state laws.

D. Conclusion. Thus, in applying both template tests, the stricter standards of the County test are that five, not three, dwellings must exist within the 160 acre square, not somewhere on the lot, and the square is aligned with the section lines as opposed to any orientation. The State standards provides only two stricter standards, the dwellings and the other eleven lots must have existed on January 1, 1993.

Nothing in ORS 197.646(3) says that the County's ordinance does not also apply and its language does not imply that the County's ordinance does not apply unless local regulations are inconsistent with the state rule required to be directly applied. In *Evans,* the County Board of Commissioners applied the stricter features of each test. The County staff, in this application, applied the stricter features of both the County Code and the OAR. The Hearings Officer agrees with the County that both State law and County code criteria are applicable. The issue is whether the County can have more restrictive regulations. It was established that the County can have more restrictive template dwelling regulations by *Dilworth v. Clackamas County,* 30 Or LUBA 319 (1996).

4. Criteria for Approval of SEC Permit:

MCC 11.15.6404 (A): All uses permitted under the provision of the underlying district are permitted on lands designated SEC; provided, however, that the location and design of any use, or change or alteration of a use, except as provided in MCC. 6406, shall be subject to an SEC permit.

Finding. A single family dwelling in the CFU zoning district requires review and approval of a conditional use permit. Provided the Conditional Use Permit is approved, the proposed use for the single family dwelling may obtain an SEC approval.

MCC 11.15.6420: The SEC designation shall apply to those significant natural resources, natural areas, wilderness areas, cultural areas, and wild and scenic waterways that are designated SEC on the Multnomah County sectional maps. Any proposed activity or use requiring an SEC permit shall be subject to the following:

(A) The maximum possible landscaped area, scenic and aesthetic enhancement, open space or vegetation shall be provided between any use and a river, stream, lake, or floodwater storage area.

Finding. None of the above exists on or near the property. The criteria does not apply.

(B) Agricultural land and forest land shall be preserved and maintained for farm and forest use.

Finding. In the entire context of the Code's requirements, a residence is allowed if all Code standards are met. To that extent, land need not be preserved and maintained for farm and forest uses. The construction of the single family dwelling with its primary and secondary fire safety zones will reduce the parcel's capability to grow forest products, but a portion of the property will still be able to be used for forest practices. A dwelling on this lot can meet this criteria.

(C) A building, structure, or use shall be located on a lot in a manner which will balance functional considerations and costs with the need to preserve and protect areas of environmental significance.

Finding. The placement of the dwelling meets the SEC-h wildlife criteria below. By meeting these standards, the applicant has shown compliance with the above criteria.

(D) Recreational needs shall be satisfied by public and private means in a manner consistent with the carrying capacity of the land and with minimum conflict with areas of environmental significance.

Finding. The proposed use and location do not conflict with any known recreational use proposed. The proposed use is a single family residence. This criterion does not apply.

(E) The protection of the public safety and of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.

Finding. No significant concerns for vandalism and trespass are in the record. The added presence of a dwelling will likely provide protection for the property owner by having a permanent presence on the site. This criterion is met

(F) Significant fish and wildlife habitats shall be protected.

Finding. No significant streams exist on the subject property. The applicant has met the specific criteria for SEC-h (wildlife habitat) and by doing so has met the above criteria.

(G) The natural vegetation along rivers, lakes, wetlands and streams shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuos riparian corridors.

Finding. No significant rivers, lakes, or wetlands exist on the subject property. This criterion does not apply.

(H) Archaeological areas shall be preserved for their historic, scientific, and cultural value and protected from vandalism or unauthorized entry.

Finding. There are no archaeological areas identified on this property as part of the County's Goal 5 inventory. The applicant is advised that, if archaeological objects are discovered during construction, state statutes require construction to be stopped and the State Historic Preservation Office to be notified. This criterion is met.

(I) Areas of annual flooding, floodplains, water areas, and wetlands shall be retained in their natural state to the maximum possible extent to preserve water quality and protect water retention, overflow, and natural functions.

Finding. There are no identified areas of flooding, floodplains, water areas and wetlands on the subject property. This criterion does not apply.

(J) Areas of erosion or potential erosion shall be protected from loss by appropriate means. Appropriate means shall be based on current Best Management Practices and may include restrictions on timing of soil disturbing activities.

Finding. The subject parcel is located in the Tualatin Basin. A Grading and Erosion Control permit will be required prior to any construction or further grading under MCC 9.40.010. This criterion can be met.

(K) The quality of the air, water, and land resources and ambient noise levels in areas classified SEC shall be preserved in the development and use of such areas.

Finding. The project is a single family dwelling. Construction of the dwelling and improvement of the driveway will not affect the quality of the air, water, ambient noise levels in the area classified SEC. The impacts of a single family dwelling have not been determined to be detrimental to the existing levels. This criterion is met.

(L) The design, bulk, construction materials, color and lighting of buildings, structures and signs shall be compatible with the character and visual quality of areas of significant environmental concern.

Finding. The applicant has not submitted any elevations or floor plans for the proposed structure at this time. If the structure is approved, it will be reviewed under the Design Review criteria of MCC 11.15.7820. This criteria can be ensured through the design review process.

(M) An area generally recognized as fragile or endangered plant habitat or which is valued for specific vegetative features, or which has an identified need for protection of natural vegetation, shall be retained in a natural state to the maximum extent possible.

Finding. No fragile or endangered plant habitat has been identified for this property.

(N) The applicable Policies of the Comprehensive Plan shall be satisfied.

Finding. The applicable policies of the Comprehensive plan are addressed after the SEC-h criteria.

MCC 11.15.6426: Criteria for approval of SEC-h Permit Wildlife Habitat:

(A) In addition to the information required by MCC .6408 (C), an application for development in an area designated SEC-h shall include an area map showing all properties which are adjacent to or entirely or partially within 200 feet of the proposed development, with the following information, when such information can be gathered without trespass:

(1) Location of all existing forested areas (including areas cleared pursuant to an approved forest management plan) and non-forested "cleared" areas; For the purposes of this section, a forested area is defined as an area that has at least 75% crown closure, or 80 square feet of basal area per acre, of trees 11 inches DBH and larger, or an area which is being reforested pursuant to Forest Practices Rules of the Oregon Department of Forestry. A non-forested "cleared" area is defined as an area which does not meet the description of a forested area and which is not being reforested pursuant to a forest management plan.

(2) Location of existing and proposed structures;

(3) Location and width of existing and proposed public roads, private access road, driveways, and service corridors on the subject parcel and within 200 feet of the subject parcel's boundaries on all adjacent parcels;

(4) Existing and proposed type and location of all fencing on the subject property and on adjacent properties entirely or partially within 200 feet of the subject property.

(B) Development Standards:

(1) Where a parcel contains any non-forested "cleared" areas, development shall only occur in these areas, except as necessary to provide access and to meet minimum clearance standards for fire safety.

Finding. Based upon the applicant's 1994 air photo, no cleared areas appear on the site. The proposed home site is located entirely within the forested portion of the site. The siting of a home and its primary fire break would require the removal of approximately 25 to 30 red alders and four to eight big-leaf maples. Approximately 1 acre will be converted from forest into the

dwelling site and primary fire safety zone. In the secondary fire safety zone, the underbrush and small trees will need to be removed to prevent the spread of fire.

(2) Development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the site.

Finding. The southeast edge of the original site for the proposed single family dwelling was approximately 160 feet from N.W. Moreland Road. The applicant modified his proposal by moving the dwelling site to approximately 50 feet from N.W. Moreland Road. N.W. Moreland Road is a County maintained roadway capable of providing reasonable practical access to the home site. This criterion is met.

(3) The access road/driveway and service corridor serving the development shall not exceed 500 feet in length.

Finding. The driveway as revised is approximately 265 feet in length. This criterion is met.

(4) The access road/driveway shall be located within 100 feet of the property boundary if adjacent property has an access road or driveway within 200 feet of the property boundary.

Finding. The proposed driveway parallels Moreland Road and is approximately 100 feet from the property boundary. There is no adjacent development within 200 feet of the property boundary on the west side of Moreland Road. This criteria does not apply towards development of the east side of Moreland Road.

(5) The development shall be within 300 feet of the property boundary if adjacent property has structures and developed areas within 200 feet of the property boundary.

Finding. The proposed home site is within 300 feet of the property boundary. There is no adjacent development within 200 feet of the property boundary on the west side of Moreland Road. This criteria does not apply towards development of the east side of Moreland Road.

(6) Fencing within a required setback from a public road shall meet the following criteria:

(a) Fences shall have a maximum height of 42 inches and a minimum 17 inch gap between the ground and the bottom of the fence.
(b) Wood and wire fences are permitted. The bottom strand of a wire fence shall be barbless. Fences may be electrified, except as prohibited by County Code.
(c) Cyclone, woven wire, and chain link fences are prohibited.
(d) Fences with a ratio of solids to voids greater than 2:1 are prohibited.
(e) Fencing standards do not apply in an area on the property bounded by a line along the public road serving the development, two lines each drawn perpendicular to the principal structure from a point 100 feet from the end of the structure on a line perpendicular to and meeting with the public road

serving the development, and the front yard setback line parallel to the public road serving the development.

Finding. No fencing is proposed.

(7) The nuisance plants listed shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property.

Finding. Landscaping will not include any plants from the nuisance plant list. Currently no nuisance plants with the exception of a small amount of Himalayan blackberry are known to occur on the property.

(C) Wildlife Conservation Plan. An applicant shall propose a wildlife conservation plan if one of two situations exist.

(1) The applicant cannot meet the development standards of Section (B) because of physical characteristics unique to the property. The applicant must show that the wildlife conservation plan results in the minimum departure from the standards required in order to allow the use; or

(2) The applicant can meet the development standards of Section (B), but demonstrates that the alternative conservation measures exceed the standards of Section B and will result in the proposed development having less detrimental impact on forested wildlife habitat than the standards in Section B.

(3) The wildlife conservation plan must demonstrate the following:

(a) That measures are included in order to reduce impacts to forested areas to the minimum necessary to serve the proposed development by restricting the amount of clearance and length/width of cleared areas and disturbing the least amount of forest canopy cover.

(b) That any newly cleared area associated with the development is not greater than one acre, excluding from this total the area of the minimum necessary accessway required for fire safety purposes.

(c) That no fencing will be built and existing fencing will be removed outside of areas cleared for the site development except for existing areas used for agricultural purposes.

(d) That revegetation of existing cleared areas on the property at a 2:1 ration with newly cleared areas occurs if such cleared areas exist on the property.

(e) That revegetation and enhancement of disturbed stream riparian areas occurs along drainage's and streams located on the property occurs.

Finding. The project as revised meets the maximum access road/driveway length of 500 feet. The development standards can be met. No wildlife conservation plan is required.

(4) For Protected Aggregate and Mineral (PAM) subdistrict, the applicant shall submit a Wildlife Conservation Plan which must comply only with measures identified in the Goal 5 protection program that has been adopted by Multnomah County for the site as part of the program to achieve the goal.

Finding. Not applicable.

5. MULTNOMAH COUNTY COMPREHENSIVE PLAN POLICIES:

Policies in the Comprehensive Plan which are applicable to this Quasi-judicial Decision are addressed as follows:

Policy No. 13, Air, Water and Noise Quality: Multnomah County, ... Supports efforts to improve air and water quality and to reduce noise levels. ... Furthermore, it is the County's policy to require, prior to approval of a legislative or quasi-judicial action, a statement from the appropriate agency that all standards can be met with respect to Air Quality, Water Quality, and Noise Levels.

Finding. The subject dwelling will generally have no impact on air quality. A well and on-site disposal system will be established on the site to serve the proposed dwelling, in compliance with all applicable standards. The dwelling location is not within a noise impacted area and the dwelling is not a noise generator.

Policy No. 14, Development Limitations. The County's Policy is to direct development and land form alterations away from areas with development limitations except upon a showing that design and construction techniques can mitigate any public harm or associated public cost, and mitigate any adverse effects to surrounding persons or properties. Development limitations areas are those which have any of the following characteristics:

A. **Slopes exceeding 20%;**
B. **Severe soil erosion potential;**
C. **Land within the 100 year flood plain;**
D. **A high seasonal water table within 0-24 inches of the surface for more than 3 or more weeks of the year;**
E. **A fragipan less than 30 inches from the surface; and**
F. **Lands subject to slumping, earth slides or movement.**

Finding. The applicant submitted slope calculations indicating the slopes on the dwelling site are 20%.

Policy No. 22, Energy Conservation: The County's policy is to promote the conservation of energy and to use energy resources in a more efficient manner. ... The County shall require a finding prior to approval of a legislative or quasi-judicial action that the following factors have been considered:

Finding. The applicant argued that to the extent Policy 22 and the following standards and criteria are not set forth in the Multnomah County zoning code, the policy, standards or criteria cannot serve as the basis of an approval or denial of this permit application. ORS 215.416(8). ORS 215.416(8) states: ".Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole. It is Multnomah County's Land Use Planning sections interpretation that the policies action as part of a quasi-judicial action are allowed by the "...other appropriate ordinance or regulation of the county...". The Comprehensive Plan was adopted by ordinance.

A. **The development of energy-efficient land uses and practices;**

Finding. The application complies with this policy. Power lines running along N.W. Moreland, adjacent to applicant's property, provide electricity to the site. Applicant proposes to construct a single family dwelling with modern, energy efficient amenities to ensure the efficient use of energy. Applicant's home will be of a modest size, placing limited demands on energy resources. The nature of the single family dwelling ensures that energy use will be consistent with that of other single family residences in the area. Applicant intends to make use of the property in a manner typical of that of other single family residence owners.

B. **Increased density and intensity of development in urban areas, especially in proximity to transit corridors and employment, commercial and recreation centers;**

Finding. This development is not located within a urban area. This criterion does not apply.

C. **An energy-efficient transportation system linked with increased mass transit, pedestrian and bicycle facilities;**

Finding. The applicant's property is served by a well developed roadway system, including Skyline Boulevard, providing quick and efficient access to Downtown Portland and Metro mass transit systems.

D. **Street layouts, lotting patterns and designs that utilize natural environmental and climactic conditions to advantage.**

Finding. The proposed home site location is the most suitable location for a dwelling on the parcel. The proposed dwelling location is a relatively flat area with gentle slopes. The proposed home site would disturb very little land and involves the least disturbance to young and healthy vegetation. Applicant proposes to leave the firs standing. The trees left intact will act to buffer applicant's property from the surrounding properties and activities upon them. Due to relatively dense vegetation throughout the property, the impact of a dwelling on nearby or adjoining farm/forest lands will be virtually the same at any location on the site. Applicant has selected a site relatively close to N.W. Moreland Road.

E. **Finally, the County will allow greater flexibility in the development and use of renewable energy resources.**

Finding. Due to the forested nature of applicant's property, the ability to harness and use solar energy on site is limited and not cost effective. Applicant will be using renewable forest resources from the land as a means to partially heat the residence and lessen dependence on other forms of available energy.

Policy No. 37, Utilities: The County's policy is to require a finding prior to approval of a legislative hearing or quasi-judicial action that:

WATER DISPOSAL SYSTEM:

A. The proposed use can be connected to a public sewer and water system, both of which have adequate capacity; or
B. The proposed use can be connected to a public water system, and the Oregon Department of Environmental Quality (DEQ) will approve a subsurface sewage disposal system on the site; or
C. There is an adequate private water system, and the Oregon Department of Environmental Quality (DEQ) will approve a subsurface sewage disposal system; or
D. There is an adequate private water system, and a public sewer with adequate capacity.

DRAINAGE:

E. There is adequate capacity in the storm water system to handle the increased run-off; or
F. The water run-off can be handled on the site or adequate provisions can be made; and
G. The run-off from the site will not adversely affect the water quality in adjacent streams, ponds, lakes or alter the drainage on adjacent lands.

ENERGY AND COMMUNICATIONS:

H. There is an adequate energy supply to handle levels projected by the plan; and
I. Communications facilities are available.

Finding. The subject property will be served by a water well approximately 725 feet in depth and 50 to 100 feet from the home site and have a septic system for sewage disposal. Applicant received certification of private on-site sewage disposal from Multnomah County Sanitarian, for the use of a septic tank and drainfield, Land Feasibility Study No. 105-94, dated 7/8/94. (Exhibit 6). The development will not require public services other than power and telephone which are already available along N.W. Moreland Road.

Policy No. 38, Facilities: The County's Policy is to require a finding prior to approval of a legislative or quasi-judicial action that:

A. The appropriate School District has had an opportunity to review and comment on the proposal.
B. There is adequate water pressure and flow for fire fighting purposes; and

C. **The appropriate fire district has had an opportunity to review and comment on the proposal.**

D. **The proposal can receive adequate local police protection with the standards of the jurisdiction providing police protection.**

Finding. All required service provider forms have been provided.

Policy No. 40, Development Requirements: The County's policy is to encourage a connected park and recreation system and to provide for small private recreation areas by requiring a finding prior to approval of legislative or quasi-judicial action that:

A. **Pedestrian and bicycle path connections to parks, recreation areas and community facilities will be dedicated where appropriate and where designated in the bicycle corridor capital improvements program and map.**

Finding. Not applicable.

A. **Landscaped areas with benches will be provided in commercial, industrial and multiple family developments, where appropriate.**

Finding Not applicable.

A. **Areas for bicycle parking facilities will be required in development proposals, where appropriate.**

Finding. Not applicable.

IV. CONCLUSIONS

A. Conclusions for Conditional Use Request for Template Dwelling

1. Both the State and the County template dwelling standards apply with the more stringent standard controlling. The Hearings Officer directly applied the state template dwelling standards for forest lands and also applied the Multnomah County template dwelling standards for forest lands. The application meets the rectangle template standards of OAR-06-027(3) which are less restrictive than the County's template dwelling standards.

The County's template dwelling standards fall within the template dwelling standards allowed by ORS 215.750, although more restrictive than the Statute and the Administrative rules. The County Code does not allow a dwelling that is disallowed by the Statute and the Administrative Rules. However, the County Code does prohibit dwellings that are allowed by the Statute and the Administrative rules.

The application for the template dwelling does not comply with the more restrictive Multnomah County Code tests for a template dwelling. ORS 197.646(l) requires counties to amend their comprehensive plans and implementing regulations to comply with new statutes and administrative rules following post acknowledgment procedures. When this application was

filed the County had not done so. ORS 197.646(3) provides that "when" a county has not amended its plan and land use regulations, "the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions..." Nothing in these provisions provide that a county's previously adopted standards do not also apply. The general principal is that, unless the legislature has expressly provided otherwise, a local government must comply with the minimal protections of forest lands provided by state statute and administrative rules, but that the local government may apply more restrictive standards if they chose to. The applicant has provided no authority for the concept that only the State Statute and Administrative Rules apply and that a local government can not apply more stringent requirements.

2. The State Statute and Administrative rules provide for a template dwelling if there are 11 other lots within a 160 acre template centered on the property and three dwellings that existed on the lots within the template on January 1, 1993. The Multnomah County Code provides for a template dwelling, MCC 11.15.2052(A), as authorized by the State and Administrative Rules. ORS 215.705(l) and OAR 660-06-027(l). The County's template dwelling provisions were enacted before the Statute and the Administrative Rules. The applicant has provided no authority to support the idea that a local government's non-forest template dwelling provisions which are more restrictive than State Statute and Administrative rule standards must be reenacted before they might apply to a land use application made after the State Statute and Administrative rules were adopted.

The Hearings Officer found that the plain language of ORS 21 5.646(l) and (3) provide for just such a situation. These State provisions require that the State law shall be directly applicable to assure that the State's minimum forest protections will be met. However, they do not prohibit a local government from applying more restrictive standards, even if the local governments more restrictive standards were enacted before the enactment of State Law. *Dilworth* stands for the general concept that a local government may have more restrictive standards than State law. *Dilworth* does not address the question of whether more restrictive local forest dwelling standards need to be reenacted after the State enacts law applying to the subject matter. However, the general principal is that local government may apply local laws unless the state has specifically preempted the subject area, in which case only the state law applies. The State has not specifically preempted the field of regulating non-forest dwellings. As long as local regulations allow only those categories of non-forest dwellings authorized by State law, more restrictive local regulations may apply to land use decisions relating to non-forest dwellings.

3. The County Code requires that eleven (11) parcels and five (5) dwelling within the template existed at the time of application. State law requires that eleven (11) parcels and three (3) dwellings within the template existed on January 1, 1 993. The County's requirements concerning the number of dwellings is more restrictive than State law, therefore the County's regulations control. The state law requirements concerning the date that the parcels and dwellings existed are more restrictive than the County's requirements, therefore the State law controls. The County's regulations require that the template be aligned with the section lines or along a County road while the State's regulations allow for the template to be rotated. The County's regulations are more restrictive and control. This application satisfies State law requirements for template dwelling under the rectangular template. This application does not satisfy County Code Template dwelling requirements that five (5) dwellings (five v. three) existed (on 1/l/93 v. at the time application) within the template, (aligned with section lines v.

rotated) and whether the dwellings existing on 1/1/93 are within the template or on parcels within the template.

4. The project as modified meets MCC 11.15.2074(A)(3) and (4) for minimizing the driveway/service corridor. The application complies with other requirements of the County Code and Multnomah County Comprehensive Framework Plan.

5. The subject parcel does not comply with OAR 660-06-027(4)(a) because the application is does not comply with the more restrictive County template standards.

6. The lot complies with MCC 11.15.2052(A), having been lawfully created before January 25, 1990. Tax Lot 23 was created in 1983. The County partitioning requirements (MCC 11.15.2182(C) "deemed" that separate lots of record were created when a County-maintained road intersected a parcel. I conclude that the County authorized the creation of the substandard parcel by the recordation of a deed. The lot of record provision was an exemption from the minimum lot size for the MUF zone. It was the County's interpretation that the only thing the Code required to legally partition a lot was for the owner to record a new legal description of the property. According to the evidence in the record the partition was classified as a "Minor Partitions Exempted." The prior property owner of Tax Lot 23 followed the procedure outlined by the county to create a legal lot of record by recording a new legal description. The subject property was thus lawfully partitioned.

V. ORDER

Conditional Use Permit No. 8-96 and Significant Environmental Concern No. 14-96 to establish a single family dwelling on the above property is denied, based on the findings and conclusions contained herein.

Dated this 14th of May, 1997

Deniece Won

Deniece Won
Attorney at Law